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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 40

JOHN W. STANFORD, JR.,
Petitioner

vs.

STATE OF TEXAS,
Respondent

On Writ of Certiorari to the 57th Judicial District Court of Bexar County, Texas

PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, Respondent files this, its Motion for Rehearing. Respondent says that this Motion is based on substantial grounds which have not been fully presented to the Court and that Respondent's position in this Motion is that the Court in its Opinion filed on January 18, 1965, erroneously interpreted the action of Texas in making the search and seizure herein as suppression of books and ideas within the protection of the First Amendment and the Fourth Amendment to the Constitution of the United States.

The First Amendment Does Not Control the Search and Seizure in this Case

The opinion is grounded on the premise that the description of the articles seized in this case was too general to accord with the constitutional requirement of the Fourth Amendment to the Constitution of the United States forbidding unreasonable searches and seizures. This judgment by the Court rests in turn on equating the Fourth Amendment with the First which guarantees the right to a free expression of ideas, the opinion at Page 9 reciting:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus v. Search Warrant*, 367 U.S. 717; *A Quantity of Books v. Kansas*, 378 U.S. 205. No less a standard could be faithful to First Amendment freedoms. . . ."

Respondent, the State of Texas, respectfully points out that the books seized here are not seized because of ideas expressed therein. Stanford is not to be prosecuted for possession of the books or for advocating the thoughts presented. His crime against Texas, if any, is the advocacy of and the attempt at overthrowing the government of Texas by force and violence. The books and literature are one of the means used to accomplish the overthrow. Texas confesses that the books, as such, are within the protection of the First Amendment, but insists that, even so, they can be the implements used in committing the crime of illegal overthrow; as instrumentalities of crime they are subject to seizure and

would be material and probative evidence of the overthrow. In the context of the facts and circumstances of this case, Respondent urges the First Amendment has nothing to do with the seizure.

Texas does not seek to suppress the books as was the case in *Marcus v. Search Warrant*, 367 U.S. 717. It seeks only to obtain tools used in the suspected illegal overthrow of its government by Stanford, and their use as evidence would be to depict the manner, means and instrumentality by which Stanford sought to overthrow the government by force and violence. There is no desire or attempt to suppress or destroy all copies of the books seized, restrict their publication or the dissemination of any idea expressed therein, but only to show the manner and means by which certain ideas taken from particular publications were used to further the overthrow of the State government by the Communist Party.

The Search Warrant Issued Did Not Violate the Protection Afforded by the Fourth Amendment

The search warrant issued in the instant case described the premises in detail and alleged that the premise was a place where "books, records, pamphlets, cards . . . are *unlawfully* possessed and "*used*" (italic ours) and the officers were ordered to enter and take possession of this material.

We present that the material in the nature of books and pamphlets, *unlawfully* used in violation of Articles 6889-3 and 6889-3a, R. C. S. of Texas were the instrumentalies of crime ordered to be seized and were just as subject to seizure as gambling paraphernalia, narcotics or cases of whiskey. *Steele v. United States No. 1*,

267 U.S. 498, 504. They were being seized *not for the ideas or expressions themselves*, as contained the books, but *solely because of the manner in which the books were used.*

It is admittedly more obscure and difficult to explain in a manner which can be readily apparent how a book can be an instrumentality of crime when used as a text along with others to teach segments of an idea or proposition, the final result of which is to actively participate in the overthrow of the government by force and violence whenever the opportunity presents itself, than it would be to explain how Madison's notes on the Constitution were used for murder by beating another over the head with it would in itself be an instrumentality of crime. We feel, however, that the *manner* in which the book is used, irrespective of its contents, is the determining factor. It is this determining factor that permitted the seizure of the ledger, although not described in the warrant, in the case of *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231, and related cases.

In its opinion herein, this Court has cited the cases of *Wilkes v. Wood*, 19 Hon.St.Tr. 1153, and *Entick v. Carrington*, 19 Hon.St.Tr. 1029, which we respectfully submit were not in point as applied to the facts of this case as there has been no attempt to suppress the books and pamphlets seized from the Petitioner herein or any like them, or to suppress their free dissemination by others not attempting to use them for an unlawful purpose—only to use them to show the manner in which the Petitioner was attempting to use them to further the conspiracy to overthrow the government of the State of Texas by force and violence. We further

contend that a *particular* copy of the Bible, the Constitution of the United States, any of the Opinions of this Court, or of any book or pamphlet, when used as a part of a course to teach the overthrow of the government by force and violence would properly be received in evidence as an instrumentality or vehicle by which an unlawful end was being accomplished.

This case is quite different from *Marcus v. Search Warrant*, 367 U.S. 717, and *A Quantity of Books v. Kansas*, 378 U.S. 205. The *contents* of the books are not an issue. There is no contention that the articles seized are contraband or that any of the ideas contained therein standing alone are illegal. We contend, however, that if probable cause existed to make this search because the "books, records, pamphlets and cards . . . are unlawfully . . . used," they were properly seized and the State is entitled to show how they were used in a trial before a court and jury. There should really be no greater requirement in describing "instrumentalities consisting of books, records and pamphlets" which were unlawfully used than in describing "paraphernalia used in administering narcotics."

CONCLUSION

The undersigned, representing the State of Texas, respectfully pray that this honorable Court reconsider the Opinion heretofore rendered and deny the relief sought by the Petitioner, John W. Stanford, Jr.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned represents that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

HAWTHORNE PHILLIPS
First Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for Respondent were served upon Maury Maverick, Jr., Maverick Building, San Antonio 5, Texas, John J. McAvoy, 14 Wall Street, New York 5, New York, and Melvin L. Wulf, 156 Fifth Avenue, New York 10, New York, Attorneys for Petitioner, by depositing same in the United States mail, properly addressed, postage paid, certified mail, on this the 11th day of February, 1965.

HAWTHORNE PHILLIPS
Of Counsel